No. 82-1391

IN THE

Supreme Court of the United States

October Term, 1982

HERBERT SPERLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The Solicitor General's brief in opposition demonstrates the need for this Court to review the indefensible manner in which this case has been treated by the courts and the Government throughout the course of this extraordinary litigation. Petitioner faces incarceration for life without the possibility of parole upon a

conviction for violating 21 U.S.C. § 848 (engaging in a continuing criminal enterprise). The indictment and trial court instruction specifically required the jury to find the petitioner guilty of specified substantive counts (referred to as counts 8, 9 and 10 of the indictment) before it could find him guilty of violating § 848. The jury found petitioner guilty of counts 8, 9 and 10 and violating § 848. The Court of Appeals reversed the convictions on counts 8, 9 and 10, the substantive counts, because of a Jencks Act violation relating to material which could have been useful in cross-examining the Government's key witness, Barry Lipsky. It would appear that once the predicate crimes used as a basis for the convictions were reversed under basic principles of due process, the § 848 conviction should also have been reversed. The Solicitor General

acknowledges that "the merits of the issue would present a close question for a Court of Appeals on direct appeal...." But, of course, the merits could not have been presented to the Court of Appeals on direct appeal, since the reversal of the predicate crimes did not occur until after the direct appeal had been briefed and argued.*

ARGUMENT

On virtually each occasion when the question is raised of how the § 848 conviction can stand in the absence of the predicate substantive crimes, the Government and/or the court has advanced a new theory. This history of shifting theories has just received a new chapter in the brief submitted by the Solicitor General.

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* Nor can discretionary rehearing, rarely granted by the Court of Appeals, serve as an adequate substitute for direct appeal.

In petitioner's main brief, as well as in the dissenting opinions by Judge Kearse below, the claim that the § 848 conviction stands "on evidence wholly independent of Lipsky's testimony" is discussed and disposed of. Similarly, in petitioner's main brief, as well as in Judge Kearse's opinion below, the second claim that the reversals of counts 8, 9 and 10 did not preclude their use as predicates for the § 848 conviction is also dealt with extensively.

The Solicitor General now argues, however, a new theory. The Government notes that in addition to counts 8, 9 and 10, the defendant was also charged with violating 21 U.S.C. § 846(a)(1). This was count 1 in the indictment. This charge, the sentence upon which was vacated because of double jeopardy problems, 506 F.2d 1050 (2d Cir. 1977), was a lesser offense included in the criminal

enterprise charge. The Government now claims it is a valid predicate for upholding the § 848 conviction.

There are numerous deficiencies in the Government's new theory. First, the jury was not given count 1 as a predicate for count 2. It makes no difference whether the Government could have used count 1 as a predicate since that theory was not charged to the jury and using count 1 as a predicate would violate the petitioner's Sixth Amendment right to trial by jury.

Second, Count 1 could not have been a predicate for a § 848 conviction. The Government seems to have forgotten in its brief that § 848 requires more than one predicate. It requires that it be "a part of a continuing series of violations." One conspiracy to violate the narcotics laws from January 1, 1971 to May 11, 1973

in violation of 21 U.S.C. § 846 is inadequate.

Third, count 1 was a lesser included offense included in that of engaging in the criminal enterprise. The issue of whether this lesser included crime of violating § 846 which, as the Court of Appeals held, United States v. Sperling, 560 F.2d 1050 (2nd Cir. 1977), charged the same basic facts as the § 846 offense, could, under the circumstances, be a predicate for continuing criminal enterprise, is an interesting question. However, it is a question never considered or accepted by any court below because as a matter of fact and law it never arose in this case.

Fourth, § 848 requires that the violation be of a provision of the narcotics law "the punishment of which is a felony." Here, the "punishment" for violating § 846 was vacated for double

jeopardy reasons; thus it was not punished as "a felony." In addition, a violation of § 846 is not always a felony since the punishment depends upon the maximum punishment prescribed for the offense "the commission of which was the object of the attempt or conspiracy." Some offenses outlawed by the subchapter are misdemeanors. See, e.g., 21 U.S.C. § 844(a).

Whether § 846 could here be a predicate "felony" is another interesting question, but again one never considered or decided by any court below.

Underlying the Solicitor General's argument is an attitude that has pervaded this entire matter. The Solicitor General seems to argue that petitioner does not profess his innocence, that his argument is a highly technical point, and therefore, even if petitioner is correct as a matter of law, he is not entitled to

a reversal. The Government apparently fails to recognize that under our system of justice there is no difference between innocent and not guilty.*

If the Government fails to carry its burden it makes no difference whether the Petitioner does or "does not profess his innocence." Here Petitioner's conviction was premised upon the jury finding certain predicate crimes. The elimination of those predicate crimes eliminates the basis for the conviction. After the reversal, the Government could have retried Petitioner on counts 8, 9 and 10 as well as the § 848 charge had that properly been reversed. It was the Government which chose not to retry petitioner on counts 8, 9 and 10, and

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* In any event petitioner does -- categorically and unequivocally -- profess that he is totally innocent of the crime for which he is serving a life sentence: violation of § 848.

petitioner appealed, seeking to vacate the nolle prosequi order in order to face trial on counts 8, 9 and 10. It is disingenuous for the Government to suggest that he does not claim to be innocent when it precluded him from being retried on the underlying substantive counts which could have resulted in his vindication.

Further, the Government makes much of the fact that the reversals on counts 8, 9 and 10 were for non-compliance with the Jencks Act and not for violations of Petitioner's constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963). Here the convictions were reversed for failure to provide petitioner with relevant documents needed to cross-examine the Government's key witness. The reversal on statutory grounds mooted the need to reach the question of whether or not failure to produce the letter was a violation of Petitioner's constitutional

rights under Brady v. Maryland. Allowing the Government to use material despite the Jencks Act violation resurrects the constitutional claim (to the extent it is at all significant, whether the predicate crimes were reversed on constitutional or statutory grounds).

Finally, this case cries out for review by this Court, not only because, on the merits, petitioner is entitled to a reversal, but also because throughout this proceeding each court and now the Solicitor General have claimed that procedurally this case should not have been considered because it is duplicative of a prior 2255 motion. Whether Sanders v. United States, 373 U.S. 1 (1963) is claimed to act as a bar because of a previous Section 2255 petition, is itself an issue which should be reviewed by this Court. It would make a mockery of § 2255 for the courts to refuse to consider a

dispositive claim in a life imprisonment case solely on the grounds that prior courts have also refused or failed to consider the claim.

CONCLUSION

For all of the reasons stated herein and in petitioner's main submission, petitioner respectfully prays that this Court grant his petition.

Respectfully submitted,

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